FILE COPY

JUN 3 1958

Supreme Court of the United States

October Term, 1958

North Central Airlines, Inc., Petitioner,

v.

Civil Aeronautics Board, Respondent,

Lake Central Airlines, Inc., et al., Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF NORTH CENTRAL AIRLINES, INC. TO THE BRIEFS OF RESPONDENT AND INTERVENORS

INDEX

	Page
Table of Cases	ii
I. COUNTERSTATEMENT OF THE FACTS	1
II. THE BOARD IMPROPERLY CONVERTED THE ACQUISITION HEARING INTO A COMPETITIVE PROCEEDING BETWEEN PETITIONER AND THE LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP	4
III. THE BOARD'S MODIFICATION OF THE VOTING TRUST AGREEMENT TO PERMIT THE PURCHASE OF LAKE CENTRAL PREJUDICED THE RIGHTS OF PETITIONER IN THE ACQUISITION CASE	5
IV. THE BOARD'S ACTION IN HOLDING INDIVIDUAL EX PARTE CONFERENCES WITH MEMBERS OF THE LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP WAS AN IMPROPER DEPARTURE FROM THE USUAL COURSE OF ADMINISTRATIVE PROCEEDING, A DEPARTURE FROM THIS COURT'S DECISION, AND A VIOLATION OF NORTH CENTRAL'S RIGHTS TO A FULL AND FAIR HEARING	6
V. THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IMPROPERLY SANCTIONED AN UNEXPLAINED DEPARTURE BY THE CIVIL AERONAUTICS BOARD FROM ITS PRIOR NORMS CONCERNING ACQUISITION AND MERGER CASES	9

Page

VI. THE QUESTIONS ON WHICH THE COURT OF APPEALS REQUESTED SUPPLEMENTAL BRIEFS WERE PROPERLY BEFORE THE COURT. 9

VII. CONCLUSION 13

CITATIONS

Ashbacker Radio Corp. v. *F.C.C.*, 326 U.S. 327, 66 S.Ct. 148 (1945) 5

Hartman v. *North Central Airlines, Inc.*, 144 F. Supp. 885, rev. 241 F.2d 859 (7th Cir. 1957) 2, 7

Joannin v. *Ogilvie*, 49 Minn. 564, 52 N.W. 257 12

Reed v. *Boagni*, 142 S. 177 (La. App.) 12

Reopened Indiana-Ohio Local Service Case, C.A.B. Docket No. 4034 et al., Order No. E-8931 10

WKAT v. *F.C.C.*, 258 F.2d 418 (U.S.App.D.C.) 8

WLOX Broadcasting Co. v. *F.C.C.*, 260 F.2d 712 11

WORZ v. *F.C.C.*, 79 S.Ct. 114 ..... 8, 12

In The

Supreme Court of the United States

January Term, 1959

No. 872

North Central Airlines, Inc., *Petitioner*

v.

Civil Aeronautics Board, *Respondent*
Lake Central Airlines, Inc., *Intervenor*
Lake Central Employee Stockholder Group, *Intervenor*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF OF NORTH CENTRAL AIRLINES, INC. TO THE BRIEFS OF RESPONDENT AND INTERVENORS

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

I. COUNTER-STATEMENT OF THE FACTS

Petitioner (North Central Airlines, Inc.) has stated the facts in its Petition for Certiorari. We stand on that statement. Petitioner finds it necessary, however, to point out several inadequacies in the statements made by Respondent and the Intervenors.

On Page 6 of its Brief, the Solicitor General implies that the Petitioner was virtually bankrupt and that because of this virtual bankruptcy it applied several times for postponements. The statement and inference is false. North Central was always in a position to fulfill its contract with the Weesners. Testimony was adduced both before Judge Steckler of the United States District Court for the Southern District of Indiana (*Hartman* v. *North Central Airlines, Inc.*, 144 F.Supp. 885) and before Trial Examiner Pfeiffer to the effect that North Central would have had no difficulty in paying the purchase price of $80,000 (Rec. 498, 499). Moreover, there was a specific provision in the contract which enabled North Central to assign its contract to its officers or its directors and the Purdue Research Foundation most of whom were capable and desirous of individually paying for the Lake Central stock. (Rec. 58, ¶10).

The postponements which the Justice Department referred to were postponements requested by North Central because of the fact that its key witnesses were out of the country and because of the imminence of the publication of the Lake Central mail rate decision (Orig. Tr. 311, 355, 359). This decision was obviously pertinent as the price to be paid for the stock was based upon this decision (Rec. 55). At no time was a postponement requested or granted because of purported financial distress.

The actual situation was the contrary of that implied by the Respondent. In March of 1954, two and one-half month before the Lake Central Employee Stockholders had their *ex parte* conferences with the Board concerning their approval of their agreement to purchase the Lake Central stock, North Central, in answer to a request by the Hearing Examiner, stated in writing that it was ready and willing to proceed with the acquisition hearing (Orig. Tr. 362). The facts are that both Lake Central and the Lake Central Employee Stockholders requested delays in the hearing and prevented North Cen-

tral from obtaining a hearing until they had perfected their organization and petitioned the Board themselves for the hearing (Orig. Tr. 364, 366). During this period, North Central moved several times for an expedited hearing (Orig. Tr. 443, 453, 481).

Lake Central's statement of the facts apparently finds North Central's statement objectionable as not relating to public interest considerations set forth in Section 2 (LCA Brief, pp. 3 and 4). It is our contention that the facts cited in our Petition relate directly to public interest considerations. This is supported by the Department of Justice's Brief, which recites in its statement of facts many of the facts alluded to by Petitioner.

Counsel for Lake Central states on Pages 4 and 5 that the size of Lake Central was the controlling consideration in the determination by the Examiner that the acquisition would be in the public interest. This is contrary to the findings of th Trial Examiner, which were based on this and a number of other considerations (Rec. 441-467). To us, the primary basis of the Examiner's decision was that North Central offered the Lake Central cities more service at less cost to the Government than would continued operation by Lake Central (Rec. 452-457).

On Page 5 of the Lake Central Brief, it attempts to elevate the Bureau Counsel's position to the same level as an initial decision by the Trial Examiner. Obviously the position of the Bureau of Air Operations, a party to the proceeding, has not the same status as that of a Trial Examiner, an impartial arbiter having a position similar to that of a trial judge. This attempt on the part of Lake Central to elevate the position of the Bureau is misleading.[1]

[1] Despite the Board's finding that Lake Central could make substantial progress toward self-sufficiency within a reasonable time, Lake Central is still one of the smallest, highest-cost, highest-subsidized carriers and North Central is still one of the largest, lowest-cost, lowest-subsidized operators.

II. THE BOARD IMPROPERLY CONVERTED THE ACQUISITION HEARING INTO A COMPETITIVE PROCEEDING BETWEEN PETITIONER AND THE LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP.

Neither Lake Central nor the Lake Central Employee Stockholders seriously treat this contention of North Central. The Department of Justice, on Pages 10 and 11 of its Brief, attempts to justify the Board's action in permitting the intervention of the Employee Stockholder Group on the basis of their interest in the proceeding. It is North Central's contention that the Board committed serious and grave error in permitting the modification of the voting trust agreement which enabled the Employee Stockholder Group to obtain an interest in the proceeding. This request for a modification of the voting trust should not have been heard prior to the acquisition case. What is even worse, the voting trust was modified without notice to North Central and an opportunity for North Central to be heard in opposition.

Respondent also states on Page 11 of its Brief: "The Board found that the acquisition of Lake Central by Petitioner considered by itself would be contrary to the public interest for reasons wholly extraneous to any control of Lake Central by the Employee Group." We have searched the Opinion and are unable to agree with this position of the Department of Justice. When the Lake Central Employee Stockholders urged that the acquisition be disapproved and presented public interest considerations in support of their position, these considerations included competitive considerations. Obviously the inclusion of competitive considerations whether they be couched in terms of public interest or otherwise in fact converted the hearing into a competitive hearing. This is evidenced by the fact that the Board compared the management of Lake Central and North Central (R. 428).

compared the subsidy savings resulting from the acquisition (R. 4280), and decided that the strengthening of Lake Central could better be achieved through route extensions rather than through the proposed merger (R. 4278). It seems to us quite immaterial whether these considerations involved public interest as well as competitive considerations. If the hearing becomes a competitive hearing for any reason, we consider the Board has transcended its powers.

III. THE BOARD'S MODIFICATION OF THE VOTING TRUST AGREEMENT TO PERMIT THE PURCHASE OF LAKE CENTRAL PREJUDICED THE RIGHTS OF PETITIONER IN THE ACQUISITION CASE.

We have previously alluded to the prejudice North Central suffered by the Board's authorizing a modification in the voting trust prior to the determination in the Acquisition Case. See Page 3, *supra*, and Pages 16-17 of our Petition for Certiorari. The Board, contrary to the pronouncement of the Supreme Court in *Ashbacker Radio Corporation v. F.C.C.*, 326 U.S. 327, caused Petitioner to suffer a serious handicap and increased burden when it changed the status of the parties and the issues in this case prior to a hearing on the merits. Even more abhorent is the fact that the Board accomplished this without giving North Central an opportunity to object by the almost facetious finding that North Central has no interest in such matters.

IV. THE BOARD'S ACTION IN HOLDING INDIVIDUAL EX PARTE CONFERENCES WITH MEMBERS OF THE LAKE CENTRAL EMPLOYEE STOCKHOLDER GROUP WAS AN IMPROPER DEPARTURE FROM THE USUAL COURSE OF ADMINISTRATIVE PROCEEDING, A DEPARTURE FROM THIS COURT'S DECISIONS, AND A VIOLATION OF NORTH CENTRAL'S RIGHTS TO A FULL AND FAIR HEARING.

Lake Central and the Lake Central Employee Stockholders contend that because Lake Central is being managed under a voting trust agreement subject to the Board's supervision, they can confer *ex parte* with the Board on this and other cases. This proposition is obviously absurd on its face. Lake Central or its Employees have no right to confer *ex parte* with the Board for any reason on pending competitive cases irrespective of the trust relationship. Moreover, the fact that these *ex parte* conferences were later made public does not expunge their prejudice or cure their transgressions. No place in the Department of Justice's Brief or the Lake Central Employee Stockholders Brief is there a denial that the conferences took place as the evidence in the record is clearly to the contrary. The defense is made that the individual *ex parte* conferences with the Board members did not involve the merits of this case. The record is clearly to the contrary. The conferences involved any official objection by the individual members to a stock purchase program by the Employees and whether the Lake Central Employee Stockholders' proposal should be considered as an alternative to the merger or dismemberment of Lake Central. Obviously these questions involve issues to be determined by the Acquisition Case. In order to determine whether the Lake Central Employee Stockholders' proposals should be considered as an alternative, it was obviously necessary to consider the content of that proposal along with North Central's

contract. This is an *ex parte* discussion on the merits. If the discussion centered around whether the Employees should go forward with the stock purchase plan this presupposes that North Central would not go forward with its contract. This equally is an *ex parte* discussion on the merits and is contrary to established judicial norms. We are not naive enough to believe that *ex parte* conferences involving these serious administrative questions were so sterile as to have no detrimental effect on North Central. Even if they were not discussions on substance, *ex parte* discussions as to procedural right to intervene are just as much a discussion on the merits as the substantive questions.

All these *ex parte* conferences took place during the time when North Central's application for approval had been filed with the Civil Aeronautics Board, an examiner assigned, a prehearing conference held, motions and counter-motions filed, and exhibit dates set. Moreover, North Central had informed the Board in writing that it wished to go forward with the merger (Orig. Tr. 362). At no place in the record in this case or in the case before Judge Steckler in the United States District Court for the Southern District of Indiana (*Hartman* v. *North Central Airlines, Inc., supra*) was there any evidence that North Central had any intention but to go forward with the case. Any impartial person would only come to the conclusion that North Central was ready, willing and able to proceed and that its case was active and pending. All the aforegoing were apparent on the face of the record to Lake Central and the Lake Central Employee Stockholders before it began its secret and clandestine discussions with the Board.

The Respondent attempts to distinguish several F.C.C. cases cited by North Central in its Petition which contain *ex parte* proceedings strikingly similar to those involved in the present case. Contrary to Respondent's con-

tentions, the discussions between the Lake Central Employee Stockholders and Board members did involve the merits of a pending case; the case was an active pending case as shown, *supra;* the *ex parte* conferences were secret and clandestine as no representative of Petitioner was present or even knew of the conferences. A secret and clandestine nature is the very essence of *ex parte* conferences. Subsequent publication of the conferences does not cure them of these grave defects. Petitioner is at a loss to understand the Department of Justice's position in this case relating to *ex parte* conferences when in other cases it has condemned them.[2] Its feeble attempt to distinguish this case from those previous F.C.C. cases is more invidious than real.

Petitioner agrees with the Solicitor General that the Court of Appeals is usually alert in dealing with questions of *ex parte* character and has on several occasions reversed and remanded. However, we believe that the Court has erred in this case in not recognizing the damage caused by these *ex parte* conferences to Petitioner. We believe the error of the Court of Appeals here is similar to the *WORZ, Inc.* v. *F.C.C. Case*, 79 S.Ct. 114 (1958), where the Supreme Court granted certiorari and remanded the case to the United States Court of Appeals for the District of Columbia Circuit on the basis of similar error involving *ex parte* conferences.

---

[2] When *WKAT* v. *F.C.C.*, 258 F.2d 418 (U.S.App.D.C. 1958) was remanded to the F.C.C. for a determination as to the prejudicial effect which certain improper *ex parte* conferences had on the parties, the Justice Department filed a brief in *amicus curiae* under the F.C.C. Docket No. 9321 *et al.*, in which it took the position that such conferences in administrative adversary proceedings are improper.

V. THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IMPROPERLY SANCTIONED AN UNEXPLAINED DEPARTURE BY THE CIVIL AERONAUTICS BOARD FROM ITS PRIOR NORMS CONCERNING ACQUISITION AND MERGER CASES.

Both Lake Central and the Department of Justice apparently misunderstand North Central's contention with respect to the necessity that the Board explain its departure from its prior norms. In presenting this point, we do not challenge the Board's use of its administrative discretion. We merely say that an unexplained departure from prior norms makes the Board's findings insufficient to enable the Court to properly perform its task of judicial review. If the Board has departed from its prior norms without good reason, its decision is arbitrary. If it has good reason for its action, that reason should be set forth specifically. Otherwise the Court will not be able to determine whether the Board's decision is arbitrary.

VI. THE QUESTIONS ON WHICH THE COURT OF APPEALS REQUESTED SUPPLEMENTAL BRIEFS WERE PROPERLY BEFORE THE COURT.

Lake Central and the Lake Central Employee Stockholder Group base their Briefs primarily on the contention that this Court cannot review the issues posed by the United States Court of Appeals in its request for supplemental briefs because North Central did not raise these issues in the administrative proceeding below or in the Court of Appeals. Respondent obviously believes that these questions can be properly considered since it does not challenge their consideration.

During the various stages of the administrative proceeding, North Central objected to the subject matter

of each of the Court's questions[3] except with respect to the *ex parte* conferences. At the prehearing conference, North Central objected to the consolidation of the applications of other potential purchasers of the Lake Central stock (Orig. Tr. 230). North Central also requested at the prehearing conference that the issues in Docket No. 5770 be restricted to the consideration of its acquisition agreement. It formalized these objections in its answer to the motions of Ozark Airlines and Transport Air Group for consolidation of their applications for the Lake Central routes with North Central's acquisition proceeding (Orig. Tr. 259). The Board recognized and passed on these objections in its Order No. E-7543 (Orig. Tr. 301), when it denied these motions to consolidate but instituted an investigation ". . . to determine whether, and upon what terms, the acquisition of the majority stockholding interest in Lake Central by North Central, Ozark and/or Air Group and whether and upon what terms the acquisition of Lake Central's Route No. 88 in whole or in part by North Central, Ozark and/or Air Group is consistent with the public interest . . ." This investigation was consolidated in Docket No. 5770 and Ozark and Air Group were permitted to intervene.

North Central also objected to the amendment of the Weesner voting trust agreement so as to permit the Lake Central Employee Stockholders to acquire the Weesners' interest (Orig. Tr. 443, 453, 463) and the intervention of the Lake Central Employee Stockholders in Docket No. 5770 (Orig. Tr. 376). The Board overruled these objections in Orders No. E-8736, E-8931 and E-9404 (Orig. Tr. 430, 484).[4]

The requirements of Section 1006(e) of the Civil Aeronautics Act of 1938, as amended, were, therefore, ful-

[3] The questions certified by the Court of Appeals are set forth on Page 568 of the Record.

[4] Order No. E-8931 was issued in the *Reopened Indiana-Ohio Local Service Case*, Docket No. 4034 et al.

filled. The Civil Aeronautics Board had ample opportunity and did, in fact, consider these issues and decided them adversely to North Central.

The Intervenors contend that since these matters were not raised before the U. S. Court of Appeals for the District of Columbia Circuit in North Central's Petition for Judicial Review, the prehearing conference stipulation, Brief, or oral argument, Rule 38(k) of the Rules of that Court operates to place them beyond the scope of the Court's consideration. Such might have been the case if Petitioner itself had attempted to raise issues other than those stipulated. The additional issues were, however, certified by the Court under its Rule 17(i). The Court has the authority at its option to notice and pass upon plain error although it was neither pointed out nor relied upon by the parties. *WLOX Broadcasting Company* v. *F.C.C.*, 260 F.2d 712 (1958).

North Central admits that it did not raise the question of the impropriety of *ex parte* conferences before the Board, but we contend that the Court of Appeals had the authority under its Rule 17(i) to raise this question *sua sponte*. Section 1006(e) of the Civil Aeronautics Act of 1938 states:

> "No objection to an order of the Authority shall be considered by the Court unless such objection has been urged before the Authority *or, if it was not so urged, unless there were reasonable grounds for the failure to do so.*" (Emphasis supplied)

It would have been unwise and impractical for us to have alienated the Board by raising this question before them. To arouse the opposition of the Board or even a single member by raising such issues could destroy a local service carrier. Because of their immaturity and their dynamic development, local service carriers are continually before the Board. They are intensively regulated and highly subsidized. A disallowance of a cent a

mile in a local carrier's subsidy payment is well within the Board's discretion and such a disallowance could cause a local carrier to become insolvent. Obviously North Central suffered serious damage because of the *ex parte* conferences in this case, but because of the above considerations and because of the great number of route applications which it prosecutes each year, North Central could suffer even greater loss if it risked alienation of the Board by pursuing the *ex parte* conference question. This is a type of administrative duress.[5] Since the Court raised this question *sua sponte*, North Central was obliged to reply. We suggest that administrative duress presents "reasonable grounds" pursuant to Section 1006(e) of the Civil Aeronautics Act for the failure of North Central to raise the issue below. Therefore, it is properly before the Court.

In the case of *WORZ* v. *F.C.C.*, supra, the Supreme Court granted certiorari over the Solicitor General's contention that no objection had been presented to the Court of Appeals and remanded the case to the Court below. Two of the justices dissented on the ground that the question had not been raised below. Obviously the Court considered the issue and rejected the Solicitor General's contention, apparently finding that the nature of the issues presents reasonable grounds for the failure to raise them.

---

[5] "Administrative duress" is analogous to "economic duress" which applies in contract cases. In contract law this "economic duress" constitutes grounds for recission. (See Williston on Contracts, Vol. 5, § 1618). For example: An unlawful refusal by a mortgagee to release a mortgage unless he is paid a bonus (*Reed* v. *Boagni*, 142 S. 171 (La. App.), or a demand of an excessive payment in order to prevent foreclosure (*Joannin* v. *Ogiltvie*, 49 Minn. 564, 52 N.W. 217) may amount to duress, which would allow one who promises to pay the bonus or excessive payment to rescind his contract. Similarly, parties to administrative proceedings who act or fail to act under administrative duress should not be forced to abide by their actions or inactions.

CONCLUSION

For the foregoing reasons and the reasons submitted in the original Petition for Certiorari, Petitioner renews its request that this Honorable Court grant its Petition for Certiorari and that the judgment of the Court of Appeals for the District of Columbia Circuit be vacated, reversed and set aside and that this case be remanded to said Court of Appeals with instructions to proceed further in accordance with the view of this Court.

A. L. WHEELER
1200 Sheraton Building
711 14th Street, N. W.
Washington 5, D. C.
Attorney for Petitioner

Dated: June 3, 1959

CERTIFICATE OF SERVICE

I, Asher L. Wheeler, counsel for the Petitioner North Central Airlines, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on June 3, 1959, I served the Reply Brief of North Central Airlines, Inc. on the parties to this cause by mailing a copy thereof to each of the persons listed below at the addresses shown, by first-class mail, postage prepaid:

The Solicitor General
Department of Justice
Washington 25, D. C.

Albert F. Grisard, Esq.
412 Metropolitan Bank Building
Washington 5, D. C.
Counsel for Lake Central Airlines
Employee Stockholder Group,
Intervenor

Franklin M. Stone, Esq.
General Counsel
O. D. Ozment, Esq.,
Assistant General Counsel
Civil Aeronautics Board
Washington 25, D. C.
Counsel for Respondent

James L. Highsaw, Jr., Esq.
Mulholland, Robie & Hickey
620 Tower Building
Washington 5, D. C.
Counsel for Lake Central
Airlines, Inc., Intervenor

A. L. WHEELER
1200 Sheraton Building
Washington 5, D. C.
Counsel for North Central Airlines, Inc., Respondent

June 3, 1959